IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL CASE N0. 19 OF 2019

DIGNA THOMASI MASSAWE.....1ST PLAINTIFF

DIGNA THOMAS MASSAWE (as administrator of the estate of the late IAN BARAKA RIWA)

VERSUS

DR.B. AUBROO.....1ST DEFENDANT

MSASANI PENINSULAR HOSPITAL CO.LTD.....2ND DEFENDANT

SHREE HINDU MANDALI HOSPITAL LTD.....3RD DEFENDANT

RULING

MKWIZU, J: -

The plaintiff, in this case, is a victim's mother suing the defendants, a medical practitioner (1st defendant), and two hospitals (2nd and 3rd defendant) for professional medical negligence actions that culminated in the death of one IAN BARAKA RIWA. The plaintiff's story is that the 1st defendant had on 5/2/2018 negligently performed an adenotonsillectomy surgery on her child, (the deceased) three years of age at the 2nd

defendant's hospital that resulted in the child suffering one episode of seizure at the time of recovery followed by visual and mental impairment and weakening of all four limbs and lastly death. The 3rd defendant is a hospital where the child was transferred for further medication after the complication caused by the 1st defendant in the 2nd defendant's hospital. Here, the plaintiff says, the child was admitted for six days and attended routine clinics before her demise on 02/1/2020.

The plaintiff thinks that the 1st defendant, an employee of the Msasani Peninsular Hospital Co Limited (2nd defendant) who operated on the child was negligent, in that he failed to take due care and diligence in attending to the child and therefore the 2nd defendant's Hospital is vicariously liable for the wrong that was committed by their employee. The Shree Hindu Mandal Hospital Ltd (3rd defendant) is impugned for accepting and admitting the child in a critical condition while knowing that it was not a referral hospital and was not availed with any report on what had transpired on the child during the operation. The defendants deny the allegation asserting that no negligence ought to be attributed to them.

When the matter came for necessary orders on 27th August 2013 the attention of the court was drawn to the ongoing proceedings at the Medical Council of Tanganyika (MCT) on the same issue and whether the

proceedings are to be stayed pending the result of the MCT or not. All parties seemed to have not been acquainted with what was going on at the MCT therefore they were availed time to research and address the court on the matter.

On 14th August 2023, Mr. Daniel Ngudungi's advocate was in court for the plaintiff, Mr. David Chillo's advocate was for the 1st and 2nd defendants while Mr. Ngasa Ganja also learned advocate was in court representing the 3rd defendant. Mr. Ngasa was the first to address the court that they have been just engaged and that their perusal of the file has revealed that the third defendant is a non-existing entity and therefore incapable of being sued. His prayer was for the parties to be allowed to address the court on this point as well. So parties were allowed to address the court on the two issues, (i) The status of the 3rd defendant and its consequences and (ii) the issue of whether the proceedings are to be stayed pending the proceedings at the MCT.

Both Mr. Ngudungi advocate for the Plaintiff and Mr Ngassa for the 3rd defendant were of the view that the proceedings at the Medical Council and before this court are not related. They said the proceedings before the MCT are purely an inquiry proceeding on Professional Disciplinary Conduct under sections 7,41,42 and 44 of the Medical Dental and Allied

Health Professionals Act,2017 while the suit before the court is for damages based on negligence while Mr Chillo for the 1st and 2nd defendant felt that the matter are similar and therefore the appropriate procedure should be to stay the proceedings pending the outcome of the MCT.

Submitting on the second point, Mr. Ngasa argued that the 3rd defendant Shree Hindu Mandal Hospital Ltd is a non-existing party. He contended that The Shree Hindu Mandal Hospital is an Institution registered under the Trustees Incorporation Act, Cap 318 of 2019 and therefore she ought under section 8(2) of the said Act to be sued by its registered name and not as it has been done by the plaintiff. He on this cited the case of **Ambassador Secondary School Vs Maxinsure Tanzania Limited**, Civil Case No.93 of 2018, and **Halima Mdee and Others Vs Board of Trustees of Chadema**, Misc Cause No. 16 of 2022, pages 24 -31, arguing the court to strike out the suit with costs. Mr Chillo advocate for the 1st and 2nd defendants was in full support of the above submissions.

While admitting that 3rd defendant is a non-existing entity incapable of being sued, Mr. Ngudungi for Plaintiff, said under Order 1 rule 10 (2) of the Civil Procedure Code[Cap 33 R: E 2019] the court is allowed at any stage of proceedings to order that the name of any party improperly joined as plaintiff or defendant be struck out and the name of the person

whom ought to have been joined whether as plaintiffs or defendant be added. He was of the view that the joining of the proper party would not be prejudicial to the 3rd defendant who is in court and aware of the case. He invited the court to strike out the name of the 3rd defendant and order for the joining of the proper party.

In rejoinder, Advocate Ngasa said, Order 1 rule 10 deals with a suit in the name of the wrong party while ours is a suit preferred against a non-existent party which cannot be cured by the provision of Order, I rule 10 of the Civil Procedure Code.

I have inquisitively considered the two issues. Parties agree that there is a pending matter reported by the plaintiff against the 1st defendant at the Medical Council of Tanganyika (MCT) established under the Medical, Dental, and Allied Health Professionals ACT, 2017. In terms of that Act, the Council (MCT) is designated as a regulator of all medical professionals vested with inquisitorial and disciplinary powers to any professional misconduct reported against a medical professional with very limited sanctions against a wrongdoer. Section 42 (4) of the Act for instance provides:

> *42 (4) The Council may after due inquiry made in accordance with the provisions of this Act*

(a)order the removal of the name of the medical, dental, or allied health professional from the Register, Roll, or a List;

(b) order the suspension from the practice of the medical, dental, or allied health professional for such period as the Council may consider necessary;

(c) caution, censure, or otherwise reprimand the medical, dental, or allied health professional; or

(d) order payment of costs involved in the inquiry, or such other cost as may be appropriate."

Reading closely the element of the penalty attached to the inquiry before the Council and the manner of the envisaged inquiry, it is clear that the Council is excluded from the ambit of civil claims. In other words, the Act does not extend the jurisdiction of the Medical Council to Civil claims. I am thus in support of Mr. Ngundungi and Mr. Ngasa's submissions that the proceedings before the MCT are purely an inquiry proceeding while the suit before the court is for damages based on negligence and

therefore unrelated. The suit is thus to proceed on merit irrespective of the pending proceedings before the MCT.

The next issue is whether the suit preferred against a non-existing party is incompetent and liable to be struck out. I have straight gone to this point because the parties' submissions suggest no doubt that 3rd defendant is a non-existing entity. They all seem to agree that the 3rd defendant, Shree Hindu Mandal Hospital LTD) is an institution registered under the Trustees Incorporation Act Cap 318 of 2019 and therefore ought to have been sued by its registered name as per section 8(1)(b) of the Act which says:

> *(1) Upon the grant of a certificate under subsection (1) of section 5 the trustee or trustees shall become a body corporate by the name described in the certificate and shall have–*
>
> *(a) perpetual succession and a common seal;*
>
> *(b) power to sue and be sued in such corporate name;*

The only pressing issue is what should be the appropriate remedy under the circumstances of this case. The defendant's counsel maintains that the court should term the suit as incompetent and proceed to strike it out

with costs while Mr. Ngudungi is of the view that the provisions of Order I rule 10(2) and 5 of the Civil Procedure Code serve the situation by allowing the striking out of the name of a party improperly joined with an order to add a party who ought to have been joined as defendant.

I have cautiously considered the position posed by the parties' counsels, firstly, in this case, the 3rd defendant is not the only part on whose shoulder the plaintiff's claims were nailed. There are other two defendants, the Doctor who operated on the patient and the Hospital where the alleged operation was conducted. The impugned third defendant is only a third perpetrator and therefore if I were to agree with Mr Ngasa's suggestion, the only appropriate remedy would be to strike out the suit against the third defendant leaving the suit against other defendants intact.

However, except for the misdescription of the 3rd defendant's name, the pleadings place the 3rd defendant as a correct party intended by the plaintiff. A curious perusal of the 3rd defendant WSD reveals a clear understanding of the complained incident by the 3rd defendant. In paragraph 12 (iv) of the amended plaint, the 3rd defendant is alleged to have admitted the patient in a comma condition while knowing that she was not a referral hospital and without a detailed report of what had

transpired during and after the operation. Responding to these allegations in paragraphs 4 and 6 of the amended WSD, 3rd defendant acknowledges the plaintiff's complaint but with an explanation of how the plaintiff's child landed in her hospital and the steps taken to rescue the situation. Paragraphs 4 and 6 of her amended written statement of defence said:

> 4. *That the contents of paragraph 9 are partly admitted only to the extent that* ***the 2nd plaintiff was transferred to and admitted by the 3rd Defendant****. The rest of the content is vehemently disputed, and the plaintiffs are put into strict proof thereof.*
>
> *(i)* ***The 2nd plaintiff was transferred to the 3rd Defendant in the state of coma following complications that developed during and after surgery namely Adenotonsilleetomy performed at the 2nd Defendant's facility. On admission, the 2nd plaintiff had a high fever, multiple attacks of tonic-clonic – seizures, and Anaemia.***

(ii) While admitted by the 3rd Defendant, the 2nd plaintiff was attended both professionally and ethically with the utmost diligence, contrary to the plaintiffs' claims, and made a remarkable recovery that, enabled discharge from the 2nd Defendant facility within fifteen days. A copy of the discharge summary and medical report are hereto annexed and marked collectively as SHM-1, The leave of this honorable court is sought to adopt the same as it forms a part of this amended written statement of defence.

(iii) That the plaintiffs on their own accord requested evacuation of the 2nd plaintiff to India.

(iv) The defendant further denies any liability on the 2nd plaintiff's current condition both directly and/or indirectly and the plaintiffs be put into strict proof on the averments thereof.

6. *That the contents of paragraphs 12 (iii), (iv), and (v) are vehemently disputed and the plaintiffs shall be put into strict proof thereof.* ***The Defendant further states that the 2nd plaintiff was admitted at the 3rd Defendants for the***

best interest of the patient per the medical professional standard and ethics. (emphasis added)

Looking at the response by the 3rd defendant above, every reasonable person would have judged the 3rd defendant as *the intended party* in the claim except for the wrong name. Meaning that the plaintiff 's claims are directed to the correct person but under *the wrong name*. I find this a bonafide mistake as to the *name* and not as to the identity of a *part*y remediable by amendment of the name. This is so because, apart from being conversant with the incident, 3rd defendant wasn't even aware of her legal name, she was comfortable with the name since the institution of the case in 2019 just to be conscious in August 2023 which is why she never challenged it.

I have also considered the position taken by this court in the cited case, **Halima Mdee and Others vs. Board of Trustees of Chadema (Supra)**, but the settled rule is that each case is determined on its own merit. Given the circumstances explained above, I believe that no injustice will be occasioned by an order for amendment of the 3rd defendant's name. A similar position was taken by the Court of Appeal in **Christina Mrimi VCoca Cola Kwanza Bottlesr Limited**, Civil Application no. 113 of 2011(CAT) (Unreported) where the plaintiff in the appeal had wrongly

cited the Respondent as Coca Cola Kwanza Bottlers Ltd instead of Coca Cola Kwanza Ltd. When approached for review, the Court of Appeal accepted the invitation by the applicant's counsel that the confusion of the name of the respondent is not a fatal irregularity, curable by deleting the word Bottlers from Coca-Cola Kwanza Ltd and inserting the correct name of the Respondent. In that case, the decision **of Evans Construction Co. Ltd. v Charrington & Co. Ltd. and Another** (19 8 3) 1 All ER 310 was brought to the Court's attention. In this later case, the tenants inadvertently named the respondent in a former landlord's name Cherrington Limited instead of Base Holding Ltd. In an application by the tenants to amend the application the Court held that -

> *"...As the mistake in this case which led to using the wrong name of the current landlord did not mislead Bass Holdings Ltd. and in my view, there can be no reasonable doubt as to the true identity of the person intended to be sued, … it would be just to correct the name of the respondent from Cherrington's Ltd. to Bass Holding Ltd."*

The same position was adopted in **Joseph Magombi V Tanzania National Parks**, Civil Appeal No 114 of 2016 (Unreported) where the Court of Appeal said:

> *"For the purpose of meeting substantive justice, we find it more appropriate to invoke application of Rule 4 (2) (b) of the Rules hand in hand with the overriding objective as per section 3A (11 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019, as amended by The Written Laws (Miscellaneous Amendments) (No.3) Act, 2018, and allow the amendment of the notice and memorandum of appeal rather than striking out the appeal. This is because by striking out it means the appellant has to start all over, the process which might take another number of years. In the same breath, we find Mr. Mwaluko's contention that we nullify all the proceedings below, a bit farfetched initiative from the dispensation of substantive justice".*

Guided by the above authorities of the Highest Court of the Land, I find and hold the error in this suit curable by amendment. The plaintiff is hereby ordered to amend the plaint to correct the name of the 3rd defendant. Since the 3rd defendant, had participated in the proceedings

from its initial stages, the suit will after the amendment proceed to a hearing from where it last ended.

Order accordingly.

E. Y Mkwizu
Judge
28/8/2023